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IN THE

Supreme Court of the United States

October Term, 1964.

174

No. [illegible]

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. The Board's Failure to Hold an Election After the Filing of a Representation Petition Is in Gross Violation of the Express Requirement of the National Labor Relations Act That the Board Proceed Immediately With an Election After the Filing of a Representation Petition Where a Question of Representation Exists. The Court of Appeals Was in Error in Refusing to Take Jurisdiction Under the Administrative Procedure Act and Under the Decision of This Court in *Leedom v. Kyne*, 358 U. S. 184	8
A. The Board Has Violated the Mandate of the Act by Refusing to Direct a Secret Election for a Period of More Than Two Years, Leaving the Employees Without Any Protection Whatsoever and at the Mercy of an Intimidating and Coercing Employer	8
B. The Four Trivial Incidents Alleged Were Not Coercive and Intimidating and Do Not Justify the Board's Refusal to Conduct an Election	11
C. Even if the Four Incidents Involved Had Been Sufficient to Create an Atmosphere of Coercion, Such Effect Would Have Disappeared Within a Short Time After They Occurred; During the Subsequent Consistently Peaceful Picketing and to This Day an Election Could Have Been Held Without Hint of Restraint, Coercion or Intimidation	13

INDEX (Continued).

Page

D. The Court of Appeals Has the Jurisdiction and Power to Direct the Board to Conduct a Representation Election, Under *Leedom v. Kyne* and the Administrative Procedure Act 15

1. The Expanded Policy of Judicial Review Expressed by This Court 16

2. The Expanded Power of Review Given to the Court of Appeals by Administrative Procedure Act 19

II. The Decision of the Court Below Is in Conflict With the Decisions of This Court in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, and *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, in Holding That Isolated and Trivial Incidents on the Picket Line Constitute an Unfair Labor Practice 22

III. The Court of Appeals Should Not Have Enforced the Order of the Board in Any Event Until the Board Satisfied Its Obligation Under the Statute to Conduct an Election 24

CONCLUSION 26

APPENDIX A:

Statutes Involved 1a

APPENDIX B:

Decision and Order of the National Labor Relations Board, and Intermediate Report 7a

APPENDIX C:

Opinion of the United States Court of Appeals for the Third Circuit 24a

APPENDIX D:

Decree of the United States Court of Appeals for the Third Circuit 31a

TABLE OF CASES CITED.

	Page
American Metal Prod. Co., 139 NLRB No. 60 (1962)	14
Atlantic-Pacific Mfg. Corp., 121 NLRB 783 (1958)	9
Bloomingdale Bros., Inc., 87 NLRB 1326 (1949)	14
Cafeteria Employees Union v. Angelos, 320 U. S. 293, 88 L. ed. 58 (1943)	12, 22, 23
Chauffeurs, Teamsters and Helpers Local Union v. Newell, 356 U. S. 341, 2 L. ed. 2d 809 (1958)	23
Craft Mfg. Co., 122 NLRB 341 (1958)	14
Deering Milliken, Inc. v. Johnston, (4 Cir. 1961) 295 F. 2d 856	21
Fitzgerald v. U. S. Lines, 374 U. S. 16, 10 L. ed. 2d 720 (1963)	19
Ford Motor Co. v. NLRB, 305 U. S. 364, 83 L. ed. 221 (1939)	19
Lloyd A. Fry Roofing Co., 123 NLRB 86 (1959)	14
Gastonia Combed Yarn Co., 109 NLRB 585 (1954)	14
The Heating, Piping & Air Conditioning Contractors, 110 NLRB 261 (1954)	9
Krodel Reubel Co., 72 NLRB 240 (1947)	14
Leedom v. Kyne, 358 U. S. 184, 3 L. ed. 2d 210 (1958)	7, 8, 15, 16, 17, 18, 19, 21, 22
Marston Corp., 120 NLRB 76 (1958)	14
Miami Newspaper Printing Pressmen v. McCulloch (D. C. Cir. 1963), 322 F. 2d 993	16, 21
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 85 L. ed. 836 (1941)	12, 22, 23
NAPA New York Warehouse, Inc., 75 NLRB 1269 (1948)	14
New York Shipping Ass'n, 107 NLRB 364 (1953)	14
NLRB v. Bar-Brook Mfg. Co., (5 Cir., 1955) 220 F. 2d 832	14
NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760, — U. S. —, 12 L. ed. 2d 129 (1964)	24
NLRB v. National Organization Master, Mates and Pilots, (7 Cir., 1958) 253 F. 2d 66	23
NLRB v. Radio and Television Broadcast Engineers Union, 364 U. S. 573, 5 L. ed. 2d 302 (1961)	15, 24

TABLE OF CASES CITED (Continued).

	Page
Republic Steel Corp. v. NLRB, (3 Cir. 1939) 107 F. 2d 472 ...	24
Switchmen's Union v. National Mediation Board, 321 U. S. 297, 88 L. ed. 61 (1943)	18
Texas & N. O. R. R. v. Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 74 L. ed. 1034	17
West-Gate Sun Harbor Co., 93 NLRB 830 (1951)	14

STATUTES CITED.

	Page
Administrative Procedure Act, 5 U. S. C. A. 1001 et seq.	2, 7, 8, 15, 16, 19, 20, 21
H. R. Rep. No. 245 (Minority), 80th Cong., 1st Sess. 85-86 (1947), 1 Legislative History of the Labor Management Relations Act, 1947, 376-77	11
H. R. Rep. No. 510, 80th Cong., 1st Sess. 50 (1947), 1 Legislative History of the Labor Management Relations Act, 1947, 554	10
Judicial Code, 28 U. S. C. A. 1337	16
National Labor Relations Act:	
Section 7, 29 U. S. C. A. 157	2, 12
Section 8(b)(1)(A), 29 U. S. C. A. 158(b)(1)(A) ..	2, 12, 22
Section 9(b)(1)	16
Section 9(c)(1), 29 U. S. C. A. 159(c)(1)	2, 8, 9, 10, 11, 15, 17, 21
Section 9(f), 29 U. S. C. A. 160(f)	2, 7
Section 10(k), 29 U. S. C. A. 160(k)	15, 24
Taft-Hartley Act (L. M. R. A., Section 9(c), 61 Stat. 144, June 23, 1947)	10
Wagner Act (N. L. R. A., Section 9(c), 49 Stat. 453, July 5, 1935)	9
28 U. S. C. Section 1254(1)	2

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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Local 542, International Union of Operating Engineers, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on April 15, 1964.

OPINIONS BELOW.

The Decision and Order of the National Labor Relations Board, and Intermediate Report, printed as Appendix B hereto, are reported in 139 N. L. R. B. 1169 (1962). The Opinion of the United States Court of Appeals for the Third Circuit, printed as Appendix C hereto, is reported in — F. 2d —. The Decree of the United States Court of Appeals for the Third Circuit is printed as Appendix D hereto.

JURISDICTION.

The Decree of the United States Court of Appeals for the Third Circuit was entered on April 15, 1964 (Appendix D). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

Where a unit of employees solicited a union to represent it, and union filed petition for certification with the National Labor Relations Board, whereupon employer discharged certain men in the unit, and a strike and picketing ensued, for a period of ten weeks, which but for four minor isolated incidents which occurred during the first eleven days of the strike, was entirely peaceful and orderly, and where the employer filed an unfair labor practice charge upon which the Board automatically refused to hold an election long after the commission of the alleged unfair labor practices:

(a) Was such picketing an unfair practice under Section 8(b)(1)(A) of the National Labor Relations Act?

(b) Should not the Board have conducted an election reasonably promptly, regardless of filing of said charge, and should not the Court of Appeals have entertained jurisdiction to direct an election?

(c) Should not the Court of Appeals have refused to enforce the Board's unfair practice order against the union in any event, until the Board had complied with the mandate of the Act by conducting a representation election?

STATUTES INVOLVED.

The statutory provisions involved are the National Labor Relations Act, Sections 7, 8(b)(1)(A), 9(c)(1), 9(f) (29 U. S. C. A. 157, 158(b)(1)(A), 159(c)(1), 160(f)); the Administrative Procedure Act, Section 10 (5 U. S. C. A. 1009).

STATEMENT OF THE CASE.

Giles and Ransome, Inc., is enagaged in the sales and servicing of mechanical equipment. Its employees were and are not affiliated with any labor union. About forty of the employees, the service and maintenance unit, met and designated representatives to arrange for a meeting with petitioner, Local 542, International Union of Operating Engineers, to determine whether an affiliation was appropriate and could be effected (110a-111a). After they met with the union representative, the men voted among themselves to proceed with the program for affiliation with the union (100a-111a; 129a). They accordingly requested the union to take all necessary steps to make Local 542 their collective bargaining agent, and furnished the union with the necessary pledge cards. Pursuant to this authorization, the union filed a petition for certification as the bargaining agent for the unit of the forty service and maintenance men (G. C. Ex. 3; 4-RC-4922),[1] on March 5, 1962.

Immediately upon receipt of the union's representation petition, Giles and Ransome discharged seven of the men in the unit (157a-158a; 161a-162a). Thereafter, the employees in the unit met, and unanimously voted to strike, in order to bring about a prompt election and to protest the discharge of their seven colleagues (94a; 112a; 129a). These employees thereupon established a picket line at the entrance to the employer's premises (94a-95a; 112a-113a). The employer arranged with the local constabulary to have round the clock police supervision of the picket line, at the employer's expense (53a).

Giles and Ransome then engaged in a series of dilatory tactics which effectively stalled the election. Early postponement delayed the hearing on the representation petition; another postponement extended the hearings; and

1. "G. C. Ex." herein refers to exhibits of respondent's General Counsel.

extensions to file briefs further protracted the proceedings before the regional director (158a-159a; RC-NT 250-255).[2] When the hearing on the representation petition was finally scheduled for March 27, 1962, Giles and Ransome filed an unfair labor charge against the union, alleging that the union was engaging in unfair labor practices on the picket line. The strike had been conducted in a peaceful, orderly fashion by the employees, with representatives of the union on hand to supervise the strike and give assistance. In the immediate area where the picket line was located, policemen privately employed by the Giles and Ransome plant patrolled the area and kept order at all times—twenty-four hours around the clock (53a). The policemen admitted that the picket line was in all respects peaceful and orderly and well conducted and that there was never any disorder, violence or threats of violence on the picket line or in the vicinity (67a, 68a, 70a, 76a, 78a, 81a, 84a).

Pursuant to suggestions by these policemen, the pickets patrolled in a specified area in order to avoid any interference with normal traffic. They were at all times in touch with union representatives, and admitted that both men were fully cooperative with the police in maintaining order and in preventing violence or threats of violence from arising (78a, 81a).

During the first eleven days of the ten weeks of picketing, four isolated incidents occurred, upon which the Board has seized as basis for an unfair practice charge and as an excuse to refuse to hold an election as commanded by the statute. These consisted of two verbal exchanges, and two minor incidents—an alleged placing of tacks under a tire and an alleged cutting of a tire.

The Olszak Incident. Olszak, an office boy—not a member of the bargaining unit, stated that while driving through the picket line, one of the pickets said to him "if I was ever caught taking parts in and out of Giles &

2. RC-NT refers to the notes of testimony in the representation hearing, March 27, and April 2, 1963.

Ransome, I'd never reach the age of twenty-one" (28a). Without more, Olszak drove through into the plant, and he continued going through the line, with ut any hindrance whatever, for the rest of the ten-week strike (29a-30a). Union witnesses testified that the remark made to Olszak on the occasion referred to his speed in driving, that "you keep driving like that, you'll never see twenty-one" (133a). It must be borne in mind that Olszak's duties were strictly inside the plant (29a), and he never had occasion to take parts out of the plant (30a). He was not a member of the bargaining unit.

The Botnick Incident. Botnick, a sales demonstrator for the employer, testified that he repeatedly drove through the picket line, and that on two occasions, remarks were made to him "a lot of name-calling, insults;" that he was "letting your fellow workers down" "you'll pay for this;" that his car "is going to have to be painted black—in black crepe paper" (33a, 34a). Botnick admitted that he is violently anti-union (40a, 105a).

The Flat Tire. Parker, an employee of Giles and Ransome, stated that as he went through the picket line on one occasion, one of the other employees in the picket line rocked his car, that thereafter he noticed he had a flat tire, that one of the employees helped him change it, and that when he returned home, he found a one-inch cut in the tire (60a, 61a). There was not even the hint of what or who caused the cut.

The Nails in the Tire. A policeman testified to an occasion when a piece of tile with nails in it was found stuck to the tire of a truck leaving the plant. He said that Adley, a union representative, had walked around to the far side of the truck and placed an object under the tire (49a-50a).

These incidents are the sum total of events which the Board stated as having occurred all during the first several days of what turned out to be an *unusually* calm and peace-

ful 10-week picket line. After the strike had been on for about four weeks, a suggestion was made by one of the employees that a secret ballot be conducted to determine whether the employees desired to remain on strike (91a; 97a; 113a). The voting was conducted on the premises of the employer, with no union representative present, and the ballots were collected and counted by the employer's police, and showed an overwhelming majority of the employees desired to remain on strike (92a; 115a). The picketing continued for about ten weeks, during which period the employees were contacted by management from time to time and received telegrams threatening loss of their jobs (61a).

Despite repeated requests from the union, the regional director continued to refuse to order an election and, on April 26, 1962, issued a complaint against the union on the employer's charge of an unfair labor practice on the picket line, based on the foregoing incidents, and set June 6, 1962, as the date for hearing. This was the last straw which broke the back of the strike. Having endured the economic hardships incident to the strike, with the desired election to choose a bargaining agent nowhere in sight, the employees lost heart, and, in a matter of a few more weeks, the men began to leave the picket line a few at a time, until, finally, the strike was disbanded and all employees returned to work (89a-90a; 94a-95a).

The Board found from the four incidents above related that the union had engaged in unfair labor practices and refused to order an election, although the picketing was peaceful and without violence or threat thereof.

The union filed a petition for review with the Court of Appeals, including a claim for the affirmative relief of directing the Board to conduct an election, and the Board filed a cross-petition for enforcement. The Court of Appeals dismissed the union's petition, including the request for affirmative relief, and ordered enforcement of the Board's cease and desist order.

The Court of Appeals held that the four incidents which occurred during the ten-week strike created an atmosphere of coercion and intimidation, and, was, therefore, an unfair labor practice. Upon the question of directing an election, the Court held that such request "is in the nature of an original action, clearly independent of either the petition for review of the petition for enforcement," and that it did not have the jurisdiction, under Section 9(f) of the Act (29 U. S. C. A. 160(f)) to review other than "final orders granting or denying relief." The Court denied that it had jurisdiction to order an election, despite the Administrative Procedure Act, 5 U. S. C. A. 1001 et seq. and the broad remedial policy announced by this Court in *Leedom v. Kyne*, 358 U. S. 184, 3 L. ed. 2d 210 (1958).

Petitioners herein seek review because the decision below is in conflict with the Labor Act requiring a prompt election where a question of representation appears, and this mandatory duty may not be postponed by the filing of an unfair labor charge. Moreover the incidents referred to cannot be construed as an unfair labor practice and may not impair the constitutional right to freedom of speech which the union men were engaged in on the picket line.

REASONS FOR GRANTING THE WRIT.

I. The Board's Failure to Hold an Election After the Filing of a Representation Petition Is in Gross Violation of the Express Requirement of the National Labor Relations Act That the Board Proceed Immediately With an Election After the Filing of a Representation Petition Where a Question of Representation Exists. The Court of Appeals Was in Error in Refusing to Take Jurisdiction Under the Administrative Procedure Act and Under the Decision of This Court in Leedom v. Kyne, 358 U. S. 184.

The Board should have ordered a representation election as soon as the representation petition was filed, at the very outset, regardless of the four trivial incidents alleged to have occurred, or at the latest, within a week or two after the last incident.

A. The Board Has Violated the Mandate of the Act by Refusing to Direct a Secret Election for a Period of More Than Two Years, Leaving the Employees Without Any Protection Whatsoever and at the Mercy of an Intimidating and Coercing Employer.

The union's petition for certification was filed on March 5, 1962, to represent 40 of the Giles & Ransome employees in the parts and service department (G. C. Ex. 3). The petition was supported by pledge cards of the employees in the unit (111a). This was confirmed by the Board on investigation, and hearings were scheduled. There was no question about the involvement of interstate commerce and sufficient employee interest to justify an election (155a-156a; RC-NT 8-9). Therefore, the conduct of an election was mandatory upon the Board.

The National Labor Relations Act, 61 Stat. 144, 29 U. S. C. A., § 159(c)(1) provides:

> "If the Board finds upon the record of such hearing that such a question of representation exists, it *shall direct an election* by secret ballot and *shall certify the results thereof.*" (Emphasis supplied.)

In the instant case, it is clear that a question concerning representation does exist. See, e.g., *Atlantic-Pacific Mfg. Corp.*, 121 N. L. R. B. 783, 784 (1958); *The Heating, Piping & Air Conditioning Contractors*, 110 N. L. R. B. 261 (1954). Throughout the hearing of the representation case herein (4-RC-4922), Local 542's status as the bargaining representative for Giles & Ransome's parts and service department employees was disputed, and the company refused to grant Local 542 recognition.

In view of the clear existence of a question of representation, the Board was under statutory mandate to order an election. The legislative history of federal labor relations legislation reveals that Section 9(c)(1) of the present Act imposes a mandatory obligation on the Board to direct a secret election forthwith after the close of a hearing. The corresponding section of the Wagner Act (N. L. R. A., Section 9(c), 49 Stat. 453, July 5, 1935) provided as follows:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under § 10 or otherwise, and *may* take a secret ballot of employees, *or utilize any other suitable method* to ascertin (sic) such representatives." (Emphasis supplied.)

Under the Wagner Act, Congress allowed the Board wide discretion in selecting procedures to determine the employees' collective bargaining representative. The

Board could take a secret ballot among the employees, or utilize any other suitable method to ascertain the employees' representative. It could certify a representative without holding an election.

In the Taft-Hartley Act (L. M. R. A., Section 9(c), 61 Stat. 144, June 23, 1947), Congress changed the prior discretionary provisions into strong mandatory language. 29 U. S. C. A. sec. 159(c)(1) provides in pertinent part:

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employees of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it *shall direct* an election by secret ballot and *shall certify* the results thereof." (Emphasis added.)

In H. R. Rep. No. 510, 80th Cong., 1st Sess. 50 (1947), 1 Legislative History of the Labor Management Relations Act, 1947, 554, the House Conference Committee stated as follows in regard to the House bill which was enacted as the present Section 9(c):

> ". . . Both under the House bill and the Senate amendment if there was reasonable cause to believe that a question of representation affecting commerce existed *a hearing was to be held.* Under the Senate amendment it was provided that such hearing could be conducted by an officer or employee in the regional office who, when he reported to the Board with respect thereto, was prohibited from making any recommendations. Both the House bill and the Senate amendment provided that if the Board found upon the hearing

that a question of representation existed *a secret ballot should be held and the results thereof certified.*" (Emphasis supplied.)

In H. R. Rep. No. 245 (Minority), 80th Cong., 1st Sess. 85-86 (1947), 1 Legislative History of the Labor Management Relations Act, 1947, 376-77, the following observations were made about the effect of the Taft-Hartley amendments to Section 9(c)(1):

> "Sections 9(c) and (d) of the bill set up substantially new procedures for the handling of representation cases. . . . If he [the administrator] believes that 'a question of representation affecting commerce exists,' the application for an election is to be transmitted to the Board, which *shall* hold a hearing, and if it finds that 'a question of representation affecting commerce exists,' *shall* direct that a secret ballot be held.
>
> ". . . The only discretion left to the Administrator or the Board is to determine whether a question of representation affecting commerce exists; having found that fact, the Administrator must transfer the case to the Board and the Board must direct the handling of an election." (Emphasis in original.)

B. The Four Trivial Incidents Alleged Were Not Coercive and Intimidating and Do Not Justify the Board's Refusal to Conduct an Election.

Despite its clear obligation, the Board still refuses to conduct an election because of the existence of four trivial and isolated incidents which occurred during the first week and a half of ten weeks of otherwise wholly uneventful picketing. Even if the incidents alleged did occur, and even as described by the Board's witnesses, they could *not* have the coercive and intimidating effect upon the employees involved in the unit, which the Board would have us believe.

The initial incident, involving Olszak, could, under no circumstances, as a matter of law, "restrain or coerce" Olszak "in the exercise of the rights guaranteed in Section 7", that is, "the right to self-organization, to . . . assist labor organizations, . . . and . . . to refrain from any and all such activities . . ." 29 U. S. C. A. 157, 158(b)(1)(A). The foregoing is what the union is accused of doing. We submit that since Olszak was not and could not be involved in the bargaining unit, it is ridiculous to assume that the union was attempting to coerce him to join or not to join the union. In this matter, he was wholly negative and irrelevant.

The Botnick incidents, based upon testimony by an admittedly prejudiced witness, is wholly devoid of credibility. But, even if events occurred as alleged, they included nothing more than "hot words", name-calling and heated discussion that is inherent in any picket line, and do not amount to unlawful activity. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 291-92, 85 L. ed. 836, 840 (1941); *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 296, 88 L. ed. 58, 60 (1943).

The cut tire and the nail in the tire incidents, even if true, do not rise to the status of intimidation and coercion. Their insignificance is obvious when viewed against the background of ten weeks of picketing. Further, it is absurd to conclude that the two men here involved, as well as the two involved in the exchanges of words, could be coerced or intimidated in the presence of the employer's police who testified to the well-regulated picket line.

Individually or collectively, these four incidents cannot rise to the level of coercion. It is difficult to see how this can be made the basis for an atmosphere of terrifying fear which would affect the men themselves in going to the polls to vote. Of utmost significance is the fact that the picketing was being carried on by the men from the plant itself. These were the men who initiated the entire proceeding and these were the men who carried on the strike. To

assume that these men were themselves being coerced is to fly in the face of reality and good judgment.

In addition, these four trivial and passing incidents took place during the first eleven days of the strike. During the remainder of the ten weeks, there were no incidents whatever, and the men patrolled the picket line in complete order and peace. They even took a poll at one stage to determine whether they should remain out. During this poll (taken, incidentally by the police employed by the employer) the men voted overwhelmingly to remain on the picket line. To justify the inaction of the Board, it must be assumed that these very men who secretly voted to stay on the picket line were being intimidated by the very activity which they confirmed.

C. Even if the Four Incidents Involved Had Been Sufficient to Create an Atmosphere of Coercion, Such Effect Would Have Disappeared Within a Short Time After They Occurred; During the Subsequent Consistently Peaceful Picketing and to This Day an Election Could Have Been Held Without Hint of Restraint, Coercion or Intimidation.

The alleged incidents which the Board has held caused an atmosphere of fear and coercion took place during the first eleven days of the picketing. Even if they could be deemed to rise to the magnitude of intimidation, such effect would have surely disappeared within a short time after the last incident, after which time an election could and should have been conducted. The Board was asked many times during the picketing to hold an election as the employees in the unit requested. But, the Board went along with the strategy of the employer, who, by the mere filing of an unfair practice charge, automatically forestalled an election—indefinitely and apparently permanently. The Board continues to refuse an election until the union breaks down and "confesses". The Board is thereby indulging in a form of coercion of its own.

It has been repeatedly held that any misconduct must have occurred "on the eve of" the election to be the proper basis for delaying the election. Here, the alleged acts were too remote to have any effect on the election. To delay the election, the atmosphere must be so charged with violence and threats of violence to the intimate knowledge of the employees, as to create a real and present fear so overwhelming as to dominate the mental processes of the employees who would be voting. *Bloomingdale Bros., Inc.*, 87 NLRB 1326 (1949). Further, and most important, this coercion must be shown to have taken place *between the time the election was directed and the holding of the election.* Thus, in *Craft Mfg. Co.*, 122 NLRB 341 (1958), the Board refused to consider acts of interference alleged to have occurred outside that period. Further, even where misconduct occurs within that period, it must be virtually on the eve of election. *NAPA New York Warehouse, Inc.*, 75 NLRB 1269 (1948). In *Krodel Reubel Co.*, 72 NLRB 240 (1947), coercive remarks *one week* before the election were held too remote to affect freedom of choice; in *Gastonia Combed Yarn Co.*, 109 NLRB 585 (1954), two weeks, and in *Lloyd A. Fry Roofing Co.*, 123 NLRB 86 (1959), two to three weeks, were held too remote. Similarly, in *NLRB v. Bar-Brook Mfg. Co.*, (5 Cir., 1955) 220 F. 2d 832, alleged violence during a strike two months before the election was held too remote to affect its validity.

It is thus obvious that the alleged incidents in this matter were not only minor and isolated, but were so remote from any election that they must be held, as a matter of law, to be insufficient to interfere with any election. Here, of course, no election has yet been scheduled.

Nor may the Board use the excuse that it will not direct an election while an unfair practice charge is pending. It has, in many occasions, held elections while charges were pending. *American Metal Prod. Co.*, 139 NLRB No. 60 (1962); *Marston Corp.*, 120 NLRB 76, 79 (1958); *New York Shipping Ass'n.*, 107 NLRB 364, 375-76 (1953); *West-Gate Sun Harbor Co.*, 93 NLRB 830 (1951).

Notwithstanding the explicit Congressional purpose to expedite Board representation procedures and the plain command of Section 9(c)(1) that an election must be held after a hearing, the Board has continued to delay and obstruct the Giles & Ransome employees' freedom to select a collective bargaining representative. In the instant case the Section 9(c) hearing was completed *more than two years ago*, yet *there has still been no direction of election.*[3] Because of the Board's refusal to direct an election, the employees, because of economic necessity, were compelled to discontinue the strike. Thus, the strike, and the employees' effort to select their own bargaining representative, were defeated by the Board's refusal to hold an election. Thus, the employer has harvested the illegal fruits of the Board's inaction despite the mandate of the Act. Meanwhile, the charges are still pending and are being appealed. It is singularly unfair to force the union to capitulate and surrender its right to an election because it desires to appeal from the Board's finding of an unfair labor practice.

The Board's refusal to hold an election in this case collides head on with the mandatory requirements of the Labor Act. The Board should be directed to hold an election forthwith.

D. The Court of Appeals Has the Jurisdiction and Power to Direct the Board to Conduct a Representation Election, Under Leedom v. Kyne and the Administrative Procedure Act.

The Court below, passing over the issue of the obligation to conduct an election, held that it was without jurisdiction to review the Board's refusal to act in any event,

3. The Board's present inaction is akin to its refusal to determine jurisdictional disputes, despite the mandatory language of Sec. 10(k) of the Act, until this Court told the Board that Congress means what it says, and that the Board *must act* when statutorily directed. *NLRB v. Radio and Telev. Broadcast Eng. Union*, 364 U. S. 573, 5 L. ed. 2d 302 (1961).

since the Board did not enter a "final order" upon this issue. This conclusion is in direct conflict with the decisions of this Court announcing a broad remedial policy of review in such cases. It is true that there have, in the past, been decisions by this Court, holding that the Court of Appeals had no jurisdiction to review a Board order concerning a representation election. But, these decisions preceded the Administrative Procedure Act of June 11, 1946, c. 324, 5 U. S. C. A. 1001, et seq., and the policy announced by this Court in *Leedom v. Kyne*, 358 U. S. 184, 3 L. ed. 2d 210 (1958).

1. *The Expanded Policy of Judicial Review Expressed by This Court.*

The contended incapacity of the Court of Appeals where the Board has refused to act despite the mandate of the statute, has been dispelled by this Court in *Leedom v. Kyne, supra*. There, the Board had disobeyed the express command of Sec. 9(b)(1) of the Act by including professional employees without their consent, in a representation unit with non-professionals. The Act provides that the Board "shall not" do so. The association of professionals brought suit in the district court asking that the Board's order be set aside. The Board contended that there was no jurisdiction. This Court held that the district court had jurisdiction under the Judicial Code. 28 U. S. C. A. 1337.

The opinion of the Court expresses a new policy of "review" of Board action in a sense not used in the Act.[4] It clarifies a relationship between the Board and the Courts demonstrating that the Court's powers of review are broader than theretofore exercised under the Act. 29 U. S. C. A. 159(d). The Court held that the National Labor

4. It "engrafted an exception upon the otherwise exclusive means of judicial review of Board orders provided by Sections 10(e)(f) of the Act." *Miami Newspaper Printing Pressmen v. McCulloch*, (D. C. Cir. 1963) 322 F. 2d 993, 994.

Relations Act did not deprive the district court of its original jurisdiction. In view of the fact that the scheme of the Act is to provide for review by Courts of Appeals, the same considerations which preserved to the district courts their powers to correct unlawful action of the Board, do equally demonstrate that the Court of Appeals has the same powers of correction—especially where it is, at once, also entertaining jurisdiction over the correctness of a final order of unfair labor practice arising between the same parties and out of the same factual background.

In *Leedom*, this Court said that the "unlawful action of the Board [which] has inflicted an injury on the [respondent]" is subject to a remedy provided by the law "apart from the review provisions of the . . . Act" (U. S. at 188, L. ed. at 214). This Court observed that Sec. 9(b)(1) expressing that "the Board *shall not*" is "clear and mandatory." Similarly clear and mandatory is the "shall direct an election" of Sec. 9(c)(1). This Court said that failure by the Board to follow this mandate "was an attempted exercise of power that had been specifically withheld"; that it deprived the professionals of a "right assured to them by Congress" (U. S. at 189, L. ed. at 214). The opinion referred to *Texas & N. O. R. R. v. Brotherhood of R. & S. S. Clerks*, 281 U. S. 548, 74 L. ed. 1034, where it was contended that since no remedy was expressly given for redress of a right, it was "merely an abstract right which was not intended to be enforced." This Court quoted its answer in that case:

> ". . . While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. . . . If Congress intended that the prohibition as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its pur-

> pose. . . . The definite prohibition which Congress inserted in the Act cannot therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." 358 U. S. at 189, 3 L. ed. 2d at 214-15.

Similar quotation was made from *Switchmen's Union v. National Mediation Board,* 321 U. S. 297, 88 L. ed. 61 (1943):

> ". . . If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 358 U. S. at 190, 3 L. ed. 2d at 215.

Continuing, this Court said that it "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of its delegated powers" (U. S. at 190 L. ed. at 215), and concluded by declaring that where Congress had given a right, "it must be held that it intended that right to be enforced." (U. S. at 191, L. ed. at 215).

The dissent in *Leedom* emphasized the broad avenue of review opened by that decision. Mr. Justice Brennan stated that the majority opinion "opens a gaping hole in this congressional wall against direct resort to the courts" (U. S. at 194, L. ed. at 217). He stated that *Congress would not have intended to permit such review by the District Courts as the majority holds to exist, and yet limit such review in the Courts of Appeals* (U. S. at 195 L. ed. at 218). Obviously, *this is the necessary conclusion.* For, indeed, if the District Court is to have power under its general jurisdiction to review Board representation actions, surely the Courts of Appeals, which were congressionally em-

powered to review Board actions, would have at least the same power.

This conclusion is especially true where the Court of Appeals has already assumed jurisdiction of the related unfair labor practice order. Both aspects of the case have common parties, common facts, and the same background and history. Therefore "simplicity and directness both in the administrative procedure and on judicial review" require that where the jurisdiction of the Court of Appeals has attached, "all pertinent questions and . . . any affirmative relief" can and should be raised, requested, answered and allowed. *Ford Motor Co. v. N. L. R. B.*, 305 U. S. 364, 369-70, 83 L. ed. 221, 227-28 (1939). Similarly, see *Fitzgerald v. U. S. Lines*, 374 U. S. 16, 20-21, 10 L. ed. 2d 720, 724 (1963), where this Court ordered the joinder of a seaman's claim for maintenance and cure and his Jones Act claim in one jury trial, in view of common parties and factors involved, and to remove unnecessary obstacles from the paths of litigants seeking justice. Having acquired jurisdiction of one aspect, the Court of Appeals should have proceeded to consider the additional pertinent question of affirmative relief sought in the matter by one of the parties involved.

2. *The Expanded Power of Review Given to the Court of Appeals by the Administrative Procedure Act.*

In addition to the expanded power of review expressed by this Court, and the pendent jurisdiction and inherent power of the Court below, Congress has specifically given to the Court of Appeals the power to grant the affirmative relief requested, by the Administrative Procedure Act, 15 U. S. C. A. 1009. This statute grants "judicial review" to anyone suffering legal wrong because of any agency action, by a proceeding "in any court specified by statute, (or) in any court of competent jurisdiction." Further, it provides that every agency action that is reviewable and every final

agency action for which there is no other adequate remedy in any court "shall be subject to judicial review"; that any intermediate agency action or ruling not directly reviewable" shall be subject to review upon the review of the final agency action". 5 U. S. C. A. (a), (b), (c).

As seen in *Leedom v. Kyne*, although action by the Board in representation proceedings may have been viewed as not a "final order" and not subject to direct judicial review, nevertheless, where Board action in violation of the N. L. R. A. has inflicted an injury, "for which the law, *apart from the review provisions of the Wagner Act*, affords a remedy," that remedy is applicable (358 U. S. at 187-88, 3 L. ed. 2d at 213-14). It is the expressed policy of this Court that the existence of administrative wrong, consequent injury, and general authority to review by a court of competent jurisdiction, require that such review be effected, despite the fact that the statute providing the substantive right may have provided its own, different method of review. As in *Leedom*, the question here is whether the Court of Appeals has the general jurisdiction to review, and whether this is limited by the specific review provisions of the N. L. R. A. The same considerations which impelled the decision concerning the jurisdiction of the district court, in view of the Judicial Code, support the jurisdiction of the Courts of Appeals, provided by the Administrative Procedure Act.

The right to representation election is clear, refusal thereof must be remedied. In labor matters involving the right to union representation, it is especially true that the remedy delayed is the right denied. The Administrative Procedure Act empowers the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed". 5 U. S. C. A. 1009(e). This section gives the Court of Appeals the power to simplify and make more flexible the rigid and delaying avenue to relief set forth in the N. L. R. A. *Kristensen v. McGrath* (D. C. Cir. 1959)

179 F. 2d 796. While *Leedom v. Kyne* dealt, under its facts, with act of the Board in excess of its powers, contrary to statutory prohibition, the principle of review applies equally where the Board fails to perform an act which the statute has commanded. Thus, in *Miami Newspaper Printing Pressmen v. McCulloch* (D. C. Cir. 1963), 332 F. 2d 993, the Court directed the district court to order the Board to certify an election, pursuant to the "shall" mandate of Sec. 9(c), 29 U. S. C. A. 159(c).

The Court below takes the position that the Administrative Procedure Act is inapplicable here, since "there is nothing in . . . the Act which extends the jurisdiction of either the district courts or the appellate courts to cases not otherwise within their competence." As pointed out hereinabove, the National Labor Relations Act *specifically gives the Courts of Appeals jurisdiction to review* the action and inaction of the Board. No additional grant of jurisdiction is necessary. Further, it is specific in the Administrative Procedure Act that review is proper in any court "specified by statute" or "of competent jurisdiction". The Court of Appeals satisfies both tests.

In *Deering Milliken, Inc. v. Johnston*, (4 Cir. 1961) 295 F. 2d 856, the Court, noting the "enforceable command" of § 6(a) of the Administrative Procedure Act, 5 U. S. C. A. 1005(a) that "every agency shall proceed with reasonable dispatch to conclude any matter presented to it", held that the district court had power, under that statute, to enjoin the N. L. R. B. from holding repeated hearings, as purposeless and oppressive. The Court referred to the presence of a "presumptive right of judicial review of administrative action", now supplied by the "clear expression of Congressional intention in the Administrative Procedure Act." (295 F. 2d at 861, n.). Referring to the reasoning in *Leedom*, the Court pointed out that the N. L. R. A. remedy was not *adequate* to the situation (864), and that, therefore, under the Administrative Procedure Act, "the courts

have the right and duty to enforce the Act's requirement that the Board proceed with reasonable expedition" (863-4).

The failure of the Board to act on the petition for representation election, after a period of over two years is an arbitrary and capricious refusal to exercise its discretion generally, a disregard of the specific mandate of the Act. This delay, violating a statutory mandate, is subject to review by this Court, as held by *Leedom v. Kyne*, under the Administrative Procedure Act.

II. The Decision of the Court Below Is in Conflict With the Decisions of This Court in Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, and Cafeteria Employees Union v. Angelos, 320 U. S. 293, in Holding That Isolated and Trivial Incidents on the Picket Line Constitute an Unfair Labor Practice.

There was no proper basis for the Board to conclude that the four incidents that occurred during the long strike constituted an unfair labor practice, under Sec. 8(b)(1)(A); 29 U. S. C. A. 158(b)(1)(A). The essence of the alleged practice was "that it restrained and coerced employees in their exercise of the right to refrain from union activities. . . ."

The action of the Board was based solely on the fact that, during the first eleven days of the ten weeks of picketing, four isolated and trivial instances occurred which they concluded were "coercive" or "intimidating" to other employees of that company. As discussed hereinabove, two of these were verbal exchanges and two were alleged minor incidents, based upon tenuous circumstances, and wholly devoid of coercive or intimidating quality. They were obviously isolated, trivial and insignificant. Further, they had *no effect* upon the employer's business, and intimidated or coerced *no one*. The picketing was peaceful, and the picketers compliant with the requests of the policemen on

the scene. The only men who could be affected by the activity were the group of employees who, by themselves, secretly voted to continue the picketing after several weeks. This proves beyond doubt that they were not intimidated. As repeatedly expressed by this Court, the actions of the men involved were a proper exercise of their right to free speech and expression. The conclusions of the Board and the Court below to the contrary clearly conflict with the policy expressed by this Court upon the subject.

This Court has repeatedly held that such isolated instances, even of violence, on an otherwise peaceful picket line do not deprive the picketing of its constitutional protection of free speech. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 85 L. ed. 836 (1941). In that case, where an injunction against violent picketing was sustained against a background of "window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings" (312 U. S. at 291-92; 85 L. ed. at 840) this Court warned that "the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has a tint of force."

This policy was reaffirmed in *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 88 L. ed. 58 (1943) wherein Mr. Justice Frankfurter stated, 320 U. S. at 296, 88 L. ed. at 60, "Still less can the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing." Similarly, see *Chauffeurs, Teamsters and Helpers Local Union v. Newell*, 356 U. S. 341, 2 L. ed. 2d 809 (1958).

It is accepted by all authorities that "a picket line is not a picnic", *NLRB v. National Organization Master, Mates and Pilots*, (7 Cir., 1958) 253 F. 2d 66, and that disorder involving name-calling and heated discussions must, in the nature of things, be expected, especially where the

strike is long drawn out, but these events do not render the activity unlawful. Thus, in *Republic Steel Corp. v. NLRB*, (3 Cir. 1939) 107 F. 2d 472, 479, the Court held that "rising passions . . . hot words . . . physical combat . . . violence . . ." must have been in the contemplation of Congress when it specifically protected the right to strike.

The situation intended by the Act and encompassed by "restrain and coerce" is such as was *beyand* the contemplation of Congress when it reconfirmed the right to strike. The practice sought to be prohibited is the true atmosphere of terror, fear, and intimidation, not merely sharp verbal exchanges or isolated incidents of mischief, as are here alleged. The Act did not contemplate prohibiting activity described as orderly and peaceful by the police, as in the instant case.

In absence of the actual existence of terror and fear, which are not present here, an unfair practice did not exist. The picketing itself was performed in accordance with the recognized standards, and was a proper exercise of free speech and expression as guaranteed by the First Amendment. *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*, — U. S. —, 12 L. ed. 2d 129, 133, 134, 137-38, 141-42 (1964).

III. The Court of Appeals Should Not Have Enforced the Order of the Board in Any Event Until the Board Satisfied Its Obligation Under the Statute to Conduct an Election.

The Court below was obliged to refuse to enforce the unfair practice charge while the Board left unexecuted its related duty to conduct an election. This Court announced such a general policy in *NLRB v. Radio and Television Broadcast Engineers Union*, 364 U. S. 573, 5 L. ed. 2d 302 (1961). There, in a proceeding under Sec. 10(k) of the National Labor Relations Act, 29 U. S. C. A. 160(k), this Court held that it is the Board's obligation to first determine which of two unions involved in a jurisdictional dis-

pute is entitled to certain work and to make award thereof, before it may adjudicate an unfair labor practice charge against one of the unions. Mr. Justice Black said that the NLRA:

> ". . . quite plainly emphasizes the belief of Congress that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions be imposed upon unions." (U. S. at 577-78, L. ed. at 306)

This Court said that the Act obliges the Board to "hear and determine the dispute" and that "any decision short of that would obviously not be conducive to quieting a quarrel between two groups" (U. S. at 479, L. ed. at 307). In absence of the full exercise by the Board of its duty under the Act, it was not in the position to adjudicate an unfair practice charge arising out of the dispute.

The principle thus stated by this Court prohibits the Board from performing only half of its obligation. In the 10(k) situations, no petition was filed for determination of the jurisdictional dispute involved with the unfair practice complaints, but there was a statutory mandate therefor. Here, a petition for election was filed, which, together with the facts presented, invoked the statutory mandate that the Board "shall direct an election". No matter how invoked, the mandate cannot be disregarded. The same overpowering policy considerations exist: the Board may not disregard its duty to act as commanded by the statute and at the same time seek enforcement of a related unfair practice order. Therefore, the Court below should have refused to enforce the Board's order until the Board had directed an election as required. Failing this, the decision of the Court below conflicts with the statutory scheme as announced by this Court, and must be reviewed.

CONCLUSION.

The opinion and decree below directly conflict with the decisions of this Court upon three important questions, which are of fundamental importance in the administration of the labor laws of the United States.

Therefore, it is respectfully requested that a Writ of Certiorari be granted so that these matters may be reviewed by this Court.

Respectfully,

ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
FREEDMAN, LANDY AND LORRY,
1415 Walnut Street,
Philadelphia, Pennsylvania 19102,
Counsel for Petitioner.

APPENDIX A.

I. NATIONAL LABOR RELATIONS ACT.

• • •

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E. D. T., c. 120, Title I, § 101, 61 Stat. 140.

§ 158. Unfair labor practices.

• • •

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

. . . . .

• • •

§ 159. Representatives and elections—(a) Exclusive representatives; employees' adjustment of grievances directly with employer.

* * *

Hearings on questions affecting commerce; rules and regulations.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

§ 160. Prevention of unfair labor practices.

• • •

Review of final order of Board on petition to court.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

• • •

II. ADMINISTRATIVE PROCEDURE ACT.

• • •

§ 1009. Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency

action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the require-

ments of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243.

* * *

APPENDIX B.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND INTERMEDIATE REPORT.

In the Matter of

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS.

(4-CB-804)

No. 14286

Decision and Order.

On August 22, 1962, Trial Examiner Phil Saunders issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel and Respondent filed exceptions to the Intermediate Report and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the excep-

tions, and briefs, and the entire record in this case, and adopts the findings, conclusions, and recommendations of the Trial Examiner with the additions, exceptions, and modifications as hereinafter set forth.[1]

ORDER.

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Local 542, International Union of Operating Engineers, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Blocking or interfering with the ingress and egress of employees at the premises of Giles & Ransome, Inc., damaging automobiles, trucks, and other property of employees and others entering or leaving those premises; and, threatening employees with physical violence, or with blacklisting or other economic reprisals, because they cross or wish to cross the picket line.

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1. Considering the present record, and the fact that the scope of the Order would not be affected thereby, we do not pass upon the Trial Examiner's disposition with respect to incidents B and G or incident F, to the extent that he finds therein a violation on the basis of the piece of tile with nails found in the area where Adley's car was parked.

We also do not adopt the Trial Examiner's characterization as "mass picketing" of certain conduct which we have found violated the Act. The complaint does not allege that Respondent engaged in "mass picketing" in violation of Section 8(b)(1)(A); nor does the evidence in the record warrant such a finding.

Although the Trial Examiner found that the Respondent, by its agents Adley and Acchioni, threatened employees Botnick and Stratton with economic reprisals for their refusal to honor the Respondent's picket line and, by such conduct, violated Section 8(b)(1)(A) of the Act, the Trial Examiner inadvertently failed to make any provision for remedying such unfair labor practices. We shall remedy the omission by providing that the Respondent shall cease and desist from engaging in such conduct.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at the offices and meeting halls of the Respondent copies of the notice attached hereto marked "Appendix."[2] Copies of said notice, to be furnished by the Regional Director for the Fourth Region, shall, after being duly signed by official representatives of the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent labor organization to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail signed copies of the notice to the Regional Director for the Fourth Region for posting by Giles & Ransome, Inc., said Company willing, at all locations where notices to the Company's employees are customarily posted.

(c) Notify the Regional Director for the Fourth Region, in writing, within 10 days from the date of this Order what steps it has taken to comply herewith.

Dated, Washington, D. C., November 21, 1962.

BOYD LEEDOM, *Member,*
JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*

(SEAL) NATIONAL LABOR RELATIONS BOARD.

2. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX.

NOTICE TO ALL OUR MEMBERS, OFFICERS, REPRESENTATIVES, AND AGENTS AND TO ALL EMPLOYEES OF GILES & RANSOME, INC.
PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT block or interfere with the ingress and egress of employees at the premises of Giles & Ransome Inc., damage automobiles, trucks, and other property of employees and others entering or leaving those premises; or threaten employees with physical violence or with blacklisting or other economic reprisals, because they cross or wish to cross our picket line.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days, from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1700 Bankers Securities Building, Walnut and Juniper Streets, Philadelphia, Pennsylvania (Tel. No. PEnnypacker 5-2612), if they have any questions concerning this notice or compliance with its provisions.

Immediate Report.

STATEMENT OF THE CASE

The unfair labor practice charges on which the complaint herein is based, were filed on March 27, 1962, and the complaint was issued April 26, 1962.[1]

This case was heard by the undersigned in Philadelphia, Pennsylvania, on June 6 and 7. The General Counsel, Giles & Ransome, Inc., herein the Company or Charging Party, and Local 542, International Union of Operating Engineers, AFL-CIO, herein the Respondent Union, were represented by counsel and all parties participated fully in the hearing. All parties hereto submitted briefs, and have been considered by me in arriving at my findings and recommendations.

It is alleged in the complaint that the Respondent Union restrained and coerced employees by threatening bodily injury because certain employees refused to observe the picket line, and inflicted damage upon motor vehicles crossing or failing to observe the picket line established by the Respondent Union. All of such conduct being alleged to be in violation of Section 8(b)(1)(A) of the National Labor Relations Act. The Respondent Union by answer denied the allegations of unfair labor practices alleged in the complaint.

FINDINGS OF FACT

I. The Business of the Respondent

Since the allegations of the complaint in this case of the facts upon which the jurisdiction of the Board is predicated, are admitted in the answer, I find the Company is a Pennsylvania corporation engaged in the retail sale and service of earth moving machinery. During the past year,

1. All dates are 1962 unless specifically stated otherwise.

the Company, in the course and conduct of its business operations, sold and distributed products with the gross value exceeding $500,000. During the past year, which is a representative period, the Company shipped and transported products from its place of business in interstate commerce directly to States of the United States other than the Commonwealth of Pennsylvania. In this period the Company further purchased goods and services from outside the State of Pennsylvania valued in excess of $50,000, and also performed services valued in excess of $50,000, outside the State of Pennsylvania. I find, therefore, that the Company is engaged in "commerce" and in operations "affecting commerce" as those terms are defined in Section 2(6) and (7) respectively, of the National Labor Relations Act, as amended, herein the Act, and that it will effectuate the policies of the Act to assert jurisdiction over the Company.

II. The Labor Organization Involved

Local 542, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

On March 5 the Respondent Union filed a petition for certification with the Board in Case No. 4-RC-4922, formal hearing on the petition was conducted on March 27 and April 3.[2]

On March 13, a group of the employees of the Company attended a union meeting at which time the Respondent's representatives spoke to the employees regarding the advantages of striking. A strike vote was taken by the employees and the result was in favor of a strike. On the following day, March 14, the strike commenced, and con-

2. At the time of this proceeding no date has been set for an election on the Union's petition for certification.

tinuing daily for approximately 10 weeks, the employees as well as other union members, picketed the entrance to the Employer's plant on a 24-hour round-the-clock basis.[3] Police officers were also on 24-hour strike duty for the purpose of observing the picket line, and to insure that its conduct was in an orderly manner. The pickets carried signs designating the Company and the Union by name. Armon Acchioni is a business agent for the Respondent Union, and William Adley is an officer of the Union and acted as the organizer during the period involved herein. Adley also supervised the picket line daily.

A. *Incident of March 16; Findings and Conclusions*

Henry Olczak, an employee of the Company and a credible witness, testified that on March 16 he drove his car through the main entrance to the company plant, and then came to a stop at the picket line. Olczak stated that he was going about 5 miles per hour when he made his turn into the plant entrance, and that he knew the pickets were on the driveway so he intentionally slowed down before making his turn off the main road. Olczak testified that when he stopped at the picket line, the Respondent's agent, Adley, then told Olczak that if he was ever caught taking parts out of the Company, he would never .each the age of 21. (Olczak is 19 years old.)

According to the testimony given by Adley, employee Olczak came down the main road above normal speed, and then made a fast turn into the company driveway. Adley stated that when Olczak stopped at the picket line, he then inquired as to how old he was, and then informed Olczak that if he kept driving like that he would never see 21. Adley further stated that he then turned to a police officer

3. The meeting at which strike action was determined upon was held at the offices of Respondent Union, by the business manager of Local 542, Mr. Robert Walsh, and by Mr. Abraham E. Freedman, counsel for Respondent. Obviously, the strike was induced and encouraged by Respondent's representatives to further Respondent's organizational campaign then in progress.

on duty and requested that he instruct Olczak to slow down, and that the officer did so.[4] Olczak denied that any police officer informed him to slow down.

On the basis of the credited testimony of Olczak, as aforestated, Adley's statement on this occasion was a threat to Olczak, who, in crossing the picket line and continuing to work, rather than join the strikers, was exercising the right guaranteed him by Section 7 of the Act to refrain from engaging in, or assisting in union activities. This right extended to any work of any type which Olczak might have been assigned, or might have chosen to do during the strike and picketing. This threat was also made on the picket line, in the presence of a number of picketing employees of the Company. The Board has frequently held that threats of violence are sufficient to constitute a violation of Section 8(b)(1)(A),[5] and that a union's lack of success in coercing nonstriking employees not to work does not render otherwise unlawful conduct lawful. I find that Adley's threat to Olczak on the occasion in question was violative of the Act.

B. *Incident of March 17; Findings and Conclusions*

The credited testimony of Police Sergeant Ashton shows that on March 17, William Sirianni, who had been recruited for, and assigned to the picket line by Adley, deliberately and recklessly blocked the ingress to the company plant of a neutral's car by forcing an impact with his car, and the car driven by Sirianni. Officer Ashton issued a traffic violation complaint against Sirianni for this offense, and stated that there were approximately 30 men on the picket line when the incident took place. Sirianni did not testify, and the statements of Officer Ashton relative to

4. Adley admitted that he would recognize all the police officers that were on duty during the strike, but he could not identify the officer he claimed warned Olczak about his fast driving.

5. See *Virginia-Carolina Freight Lines, Inc.*, 123 NLRB 551.

this matter stands undenied. I find this incident to be violative of the Act.[6]

C. *Picket Line Incidents as to Botnick; Findings and Conclusions*

Sales demonstrator Botnick, a nonstriking employee of the Company, credibly testified that on March 22, he was asked not to drive through the picket line, and told by Adley "You'll pay for this." Botnick further testified that he was also told by Adley that he would be blacklisted by the Union, and would be prevented from working on any union jobs. A week or so later Botnick again entered the plant through the picket line, and Adley then told Botnick, "Before this is all over your car is going to have to be painted black," and further stated that the car and Botnick would be in "black crepe paper." The police on duty then opened the picket line and Botnick went into the plant, but testified that in doing so someone then kicked his car.

Adley denied the statements attributed to him by Botnick, but admitted that he did inquire of Botnick as to why he had not joined his fellow employees in the picket line. Adley further admitted that on the occasions in question he also told Botnick that he sounded like he was in mourning, and then had asked Botnick, "Why don't you paint this thing black and hang a crepe on it?" In accordance with the credited testimony of Botnick, I find a violation of the Act as to the threats made by Respondent's agent Adley on the occasions in question here.

D. *Incident of March 22; Findings and Conclusions*

Joseph Parker, a credible witness, testified that he was stopped at the picket line on March 22, and was asked by

6. Neutrals, as well as strikers, may also be coerced where such conduct may reasonably become known to employees, and is coercive to them in their exercise of Section 7 rights. In addition, the Board has held that conduct causing damage to vehicles of neutrals crossing the picket line to be violative of the Act.

James McGreggor and Adley as to why he was returning to work.[7] After Parker then agreed to stay on strike 1 more day, he turned his car around and then noticed a flat rear tire, and upon returning to his home found that the tire had about an inch slash on the side of it. Parker further testified that his car was also rocked by one of the men on the picket line. It has been well established by the Board that mass picketing on company premises which interferes with ingress or egress, and damaging automobiles and other property of employees entering or leaving those premises, is a violation of Section 8(b)(1)(A). In accordance with the above and the credited testimony of Parker, I find a violation of the Respondent Union in this incident involved here.

E. *Incident of March 27; Findings and Conclusions*

This incident occurred away from the picket line at a jobsite to which Botnick and salesman Theodore Stratton delivered a bulldozer.[8] Acchioni and Adley admit conversations with Botnick and Stratton on this occasion, but Acchioni testified that his remarks were qualified in relating incidents of disorderly conduct on other picket lines, and had stated that the Respondent Union did not operate in this manner. Job Superintendent Charles Hendrickson testified that the Respondent's agents made no threats, but admitted that he had not heard all of the various conversations which went on, and that he was busy in and out of his office trying to get the dispute settled.

From the credited testimony, this record reveals that on the occasion in question Business Agent Acchioni told Botnick that anyone who goes through a picket line deserves to get his head "split open." Adley then threatened Bot-

7. Parker had originally gone out on strike, and on this occasion was attempting to go back to work.

8. The Respondent's agents Acchioni, Adley, and other men from the picket line at the company plant appeared at this jobsite shortly after the bulldozer arrived.

nick and Stratton with economic coercion through the Union by keeping them and the company equipment off all Union jobs, so that Botnick's and Stratton's livelihood would be affected. Then referring to the picket line, Adley said—"They think they've seen violence—they don't know what violence is." Adley then returned to economic coercion, and stated he would call several named customers of the Company such as U. S. Steel, Langenfelder, and S. J. Groves and henceforth company equipment would be barred from their jobs, that no matter where the company equipment went the Union could picket, and further stated to Botnick and Stratton that their names would be put in the union paper as being scabs that crossed the picket line.

Since this conduct was but another link in a pattern of unlawful conduct in which the Respondent Union was engaged, I find a violation as to the threats made by the Respondent's agents.[9]

F. *Picket Line Incident of March 27; Findings and Conclusions*

Police Officer William Edwards credibly testified that on this occasion he was letting a truck out of the company plant, when he noticed the Respondent's agent Adley placing an object underneath the left front tire.[10] Edwards stated that he then had the truck backed up, that the tile was stuck in the tire, and that Adley pulled it out of the tire after Edwards had attempted to do so. Adley then told Officer Edwards, "You got me now. You got me this time." Edwards further testified that later in the after-

9. The Act guarantees to employees the right to engage in, or refrain from engaging in union activities. Just as employees are free to strike and picket for lawful objectives, employees who do not wish to do so are free to refrain from any participation in, or assistance to a strike, and are guaranteed freedom not to cooperate with the Union or the strikers.

10. The object was identified as a piece of tile with five or six nails in it.

noon he also found a piece of tile with nails in it in an area where Adley's car had been parked.[11] This type of conduct by the Respondent's agent is clearly violative of the Act, and I so find.

G. *Incident of March 29; Findings and Conclusions*

The last incident in the chronology also involved damage to a truck leaving the plant through the picket line. The credited testimony of Police Officer Edwards shows that one of the pickets, Robert Alexander, placed his hand underneath the turn signal bracket, and pulled out the wire operating this device. Edwards issued a complaint against Alexander, and as Alexander did not testify, Officer Edwards' statements as to this incident stand undenied. Under these circumstances, I also find the Respondent's conduct violated Section 8(b)(1)(A).

H. *Final Conclusions*

Under Sections 7 and 8(b)(1)(A) of the Act, it is an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of their right to refrain from engaging in a strike or other concerted activities. In this case the record clearly shows that the Union's officers and agents threatened at least three employees of the Company with physical injury if they crossed the Respondent's picket line. In another incident, a picket damaged the car of a neutral party by causing collision with it while on the Company's premises, and in another case pickets cut the tire of an employee who was attempting to return to his job. In at least two cases the Union's agents damaged trucks who were leaving the company premises, and in these instances police had to intervene. It needs no citation of authority to demonstrate

11. Adley testified that the object in question was a tin can lid with nails in it, that he did not know how it got on the driveway, but that he was responsible for the picket line so he "grabbed for it" when the truck stopped.

that Respondent's conduct constituted unlawful restraint and coercion.

The record is also clear that the Respondent Union is legally responsible for the misconduct since the violations were committed by or in the presence of the Respondent's agents. William Adley, admittedly the Union's treasurer and official representative, set up the picket line, was in control and responsible for its management, and was at the picket line every day.[12] Adley solicited nonemployee members of the Union to serve on the picket line, and William Sirianni, Jr., who ran his car into a neutral party crossing the picket line, as aforestated, was recruited and assigned to the picket line in this way.[13] Furthermore, not only did this conduct occur during the course of the strike supported and called by the Respondent against the Company, but all except one of the specific acts were committed by or in the presence of officials or agents of the Union. The acts of Respondent's officials were, of course, the acts of Respondent. The single occurrence, at which Respondent's officials were not identified, conformed to the pattern of conduct established by the acts of these officials. As the conduct on this single occurrence comported with the pattern established by the union officers acting literally in concert with the individuals who committed the acts, the Union must be held responsible for such conduct.

The first witnesses called by the Respondent were police officers, Campbell, Walker and Johnson. In substance, they testified that while they were on duty, there was no misconduct observable by them on the picket line.

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12. The Union also stated in paragraph 6 of its answer that it supported the work stoppage and the picketing.

13. It is well established that a union is responsible for the unlawful acts of an individual, because his association and cooperation with union agents, bespeaks ratification of his activities. Likewise, the Board has held that where strikers and pickets commit conduct violative of the Act, such conduct is attributable to the Respondent where union agents are present or responsible for maintaining an orderly picket line, and where they did not clearly repudiate such conduct.

However, nowhere in the record does it indicate that these police officers were present at the times and on the dates when the unlawful incidents took place.[14] The Respondent also adduced some testimony to the effect that there were two altercations between an employee and a striker during the strike, and an employee of a neutral and a striker, respectively. It is clearly evident, however, that the Respondent cannot justify its violent conduct by showing a third party may or may not have committed an independent act of misconduct. In addition, the individuals involved in the act are unidentified.[15] In addition to the above the Respondent Union introduced testimony through two strikers that at no time were they coerced by Respondent. They testified, in substance, that when the men decided to return to work, the Respondent did not threaten them in order to keep them on the picket line. Such evidence of whether particular strikers were coerced is conclusionary, and certainly in no way substantially detracts from the violative conduct as to the specific incidents herein discussed. It is of some interest to note, however, that one striker apparently feared union reprisal for returning to work. LaMarr testified that one Tony Furlano questioned Adley about the possibility of such reprisals.

In application of these principles, together with the reasons previously given, and all coupled with the observations and demeanor of the witnesses, it is accordingly found that the Respondent violated Section 8(b)(1)(A) of the Act in the incidents herein set forth.

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14. Officer Campbell testified that he was on duty around 4 to 5 p.m. when the plant let out. Walker worked 8-hour day shifts and at other times during the strike worked on the night shift. Johnson worked various shifts, and was also in charge of a canine dog.

15. The incident involving the contractor and his employee is not dated. The incident involving the unnamed employee and a striker occurred on April 18, according to Officer Johnson, and in no way could be a defense to violent conduct occurring prior thereto.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its business operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon, the foregoing findings of fact, and upon the entire record, I make the following:

CONCLUSIONS OF LAW

1. Local 542, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. By threatening to inflict bodily injury upon employees, damaging property, and blocking or interfering with the ingress and egress of employees and others at the premises of Giles & Ransome, Inc., the Respondent has restrained and coerced the employees of the Company in the exercise of rights guaranteed by Section 7 of the Act, and has thereby engaged in, and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, it is hereby recommended that the Respondent, Local 542, International Union of Operating Engineers, AFL-CIO, its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Blocking or interfering with the ingress and egress of employees at the premises of Giles & Ransome, Inc., damaging automobiles, trucks, and other property of employees and others entering or leaving those premises; and, threatening employees with physical violence because they cross or wish to cross the picket line.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at the offices and meeting halls of the Respondent copies of the notice attached hereto as an Appendix.[16] Copies of said notice, to be furnished by the Regional Director for the Fourth Region, shall, after being duly signed by official representatives of the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall

16. In the event these Recommendations are adopted by the Board, the words, "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DEGREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

be taken by the Respondent labor organization to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail signed copies of the notice to the Regional Director for the Fourth Region for posting by Giles & Ransome, Inc., said Company willing, at all locations where notices to the Company's employees are customarily posted.

(c) Notify the Regional Director for the Fourth Region, in writing, within 20 days from the date of receipt of this Intermediate Report what steps it has taken to comply herewith.[17]

It is further recommended that unless within 20 days from the date of receipt of this Intermediate Report, the Respondent notifies said Regional Director, in writing, that it will comply with the foregoing recommendations, the Board issue an order requiring the Respondent to take the aforesaid action.

Dated at Washington, D. C., August 22, 1962.

PHIL SAUNDERS,
Trial Examiner.

17. If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Fourth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX C.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,286

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Argued October 10, 1963

Before: STALEY, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed March 13, 1964)

By SMITH, *Circuit Judge.*

This proceeding, under Section 10, subdivisions (e) and (f) of the Labor Management Relations Act of 1947, 29 U. S. C. A., 160(e) and (f), is before the Court on a petition

for review filed by Local 542, etc., the Union, and a cross-petition for enforcement filed by the Board. The Union has joined in its petition for review a claim for affirmative relief against the Board.

CEASE AND DESIST ORDER

Apparently as a result of the usual organizational activities, the Union on March 5, 1962, filed with the Board a petition for certification as the bargaining agent for the parts and service department employees of Giles & Ransome, Inc., the Company. This action was followed by the layoff of seven employees in the unit. Thereafter, on March 13, the employees of the Company met and, after they were addressed by a Union representative, voted to strike. The strike commenced on the following day and continued thereafter for approximately ten weeks. It should be noted that the strike occurred at a time when the Union representatives were engaged in their organizational activities.

A picket line, under the direction and supervision of a Union official, was maintained at the entrance to the Company's premises on a round-the-clock basis. As a consequence of a series of incidents which occurred while picketing was in progress, the Company, on March 27, filed with the Board an unfair labor practice charge on the basis of which a complaint issued. A hearing on the complaint was held on June 6, after the strike had terminated. It is clear from the record of this hearing that the Union had supported the strike.

At the hearing before the Trial Examiner there were six witnesses, five of them victims of the picketers' conduct, who testified about incidents which occurred on March 16, 17, 22 and 27, at the entrance to the Company's plant and elsewhere. The testimony of these witnesses was not substantially contradicted. We are persuaded, as was the Trial Examiner, that much of the testimony offered by the Union was negative, evasive, and lacking in probative value. The

Trial Examiner, having decided that the testimony offered by General Counsel was credible, found that the Union threatened to inflict bodily injury upon employees, damaged property of the Company and others, and interfered with or blocked ingress and egress of employees and others to the premises of the Company. These factual findings are supported by substantial evidence and may not be disturbed.

The Trial Examiner concluded that the course of conduct pursued by the Union was an unfair labor practice within the meaning of § 8(b)(1)(A), 29 U. S. C. A. § 158(b)(1)(A), in that it restrained and coerced employees in their exercise of the right to refrain from union activities, a right guaranteed by § 7 of the Act, 29 U. S. C. A. § 157. The findings of fact and conclusions of the Trial Examiner were adopted by the Board and the cease and desist order here in question issued.

The Union contends that the evidence was insufficient to support the ultimate determination that it had been guilty of an unfair labor practice within the meaning of the statute. It is argued that the episodes upon which the determination rests were so minor and isolated that they cannot be regarded as coercive. We cannot agree. The argument seems to overlook the setting in which the incidents occurred. It is significant that the incidents occurred in the early days of the strike and within the relatively short period of eleven days, when the Union was most active in its organizational effort; they were not spread over the ten weeks of the strike, as the Union here contends. It is clear from the evidence that the conduct of the offenders created an atmosphere of coercion and intimidation.

The Union urges in support of its argument that the episodes "had no effect upon the operation of the employer's business, and they coerced or intimidated no one." That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it

may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. Highway Truck Drivers & Helpers Local 107 v. N. L. R. B., 273 F. 2d 815 (D. C. Cir. 1959); Time-O-Matic, Inc. v. N. L. R. B., 264 F. 2d 96, 99 (7th Cir. 1959); Progressive Mine Workers v. N. L. R. B., 187 F. 2d 298, 301 (7th Cir. 1951); N. L. R. B. v. Ford, 170 F. 2d 735, 738 (6th Cir. 1948). The misconduct of the Union in this case met this test.

The several Supreme Court decisions cited by the Union in support of its position are clearly inapposite. The cases involved situations in which state courts enjoined the maintenance of picket lines because of violence which occurred during the course of strikes. The cease and desist order in this case was directed solely to misconduct which violated the Act.

Claim for Affirmative Relief

The petition for certification, hereinabove referred to, was filed on March 5, 1962, and formal hearings thereon were held on March 27 and April 3. This was at or about the time that the Company filed its unfair labor practice charge. Thereafter, the Regional Director apparently held further action on the petition in abeyance.

The pertinent provisions of § 9(c)(1), 29 U. S. C. A. 159 (c)(1), with reference to petitions for certification, read as follows:

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> . . . . . .
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such

a question of representation exists, it SHALL DIRECT an election by secret ballot and SHALL CERTIFY the results thereof." (Emphasis supplied.)

The Union here argues that "a question of representation" was disclosed at the hearings and that under the circumstances the Board is required to direct an election and certify the results.

There is included in the petition for review a request that this Court direct the Board to conduct a representation election and certify the results, in compliance with the statute. This claim for affirmative relief is in the nature of an original action clearly independent of either the petition for review or the petition for enforcement. Therefore, we are met at the threshold by a question as to the jurisdiction of this Court to grant the relief sought. We purposely confine our discussion to this question; whether, under the facts and circumstances of this case, the district court would have jurisdiction to compel administrative action, we do not decide.

The jurisdiction of a court of appeals to reveiw the actions of the Board, and the limits thereof, are defined by § 9(f), 29 U. S. C. A. § 160(f), the pertinent provisions of which read as follows:

> "Any person aggrieved by a FINAL ORDER of the Board GRANTING OR DENYING in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, . . . , by filing in such a court a written petition praying that the order fo the Board be modified or set aside." (Emphasis supplied.)

It is clear from a reading of the statute that the jurisdiction of this Court is limited to a review of final orders granti g or denying relief. Contractors Association of

Philadelphia and Eastern Pennsylvania v. N. L. R. B., 295 F. 2d 526 (3rd Cir. 1961), cert. den. 369 U. S. 813. There is here no such order for us to review.

The argument of the Union in support of this Court's jurisdiction rests, at least in part, on the case of Leedom v. Kyne, 358 U. S. 184 (1958). Therein the Supreme Court, having determined that the statutory review proceeding was inadequate, held that under § 1337 of Title 28 U. S. C. A., the district court had jurisdiction of an original action to vacate and set aside an order of the Board "made in excess of its delegated power and contrary to a specific prohibition in the Act." There are other cases in which the Supreme Court has sustained the jurisdiction of the district courts to entertain appropriate suits for relief against agency action where the statutory review proceeding was absent or inadequate. Stark v. Wickard, 321 U. S. 288 (1944); Philadelphia Co. v. Stimson, 223 U. S. 605 (1912); School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902) These cases cannot avail the Union. The jurisdiction of this Court under the Act is appellate and revisory, as it is in most cases, and not original.

The Union, in further support of its position, argues that this Court has jurisdiction under Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A. § 1009. The argument is based upon an erroneous construction of the statute. There is nothing in Section 10 or any other clause of the Act which extends the jurisdiction of either the district courts or the appellate courts to cases not otherwise within their competence. Ove Gustavsson Contracting Company v. Floete, 278 F. 2d 912, 914 (2d Cir. 1960), cert. den. 364 U. S. 894; Kansas City Power & Light Company v. McKay, 225 F. 2d 924, 933 (D. C. Cir. 1955), cert. den. 350 U. S. 884. The Act is clearly remedial and not jurisdictional.

It is apparent from a mere reading of Section 10(b) that where the statutory method of review is either absent or inadequate, the only remedy of an aggrieved party is

"any applicable form of legal action . . . in any court of competent jurisdiction."

The case of Deering Milliken, Inc. v. Johnston, 295 F. 2d 856 (4th Cir. 1961), cited in the Union's supplemental brief, is not to the contrary. Therein the Court determined that the review proceeding under Section 10(e) of the Labor Management Relations Act, supra, was inadequate. It held that under the circumstances the district court had jurisdiction to entertain an original action against the Regional Director of the Board under Section 10, subdivision (b) of the Administrative Procedure Act, supra.

The petition for review, including the claim for affirmative relief, will be dismissed and the petition for enforcement of the cease and desist order will be granted.

APPENDIX D.

DECREE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14286.

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

DECREE.

Before: STALEY, HASTIE and SMITH, *Circuit Judges:*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent on November 21, 1962. The Court heard argument of respective counsel on October 10, 1963, and has considered the briefs and transcript of record filed in this cause. On March 13, 1964, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Local 542, International Union of Operating Engineers, its officers, representatives, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

By THE COURT

WILLIAM F. SMITH,
Circuit Judge.

Dated: April 15, 1964.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	9

CITATIONS

Cases:

American Federation of Labor v. *National Labor Relations Board*, 308 U.S. 401	7
Boire v. *Greyhound Corp.*, 376 U.S. 473	7, 8
Highway Truck Drivers & Helpers Local 107 v. *National Labor Relations Board*, 273 F. 2d 815	6
Leedom v. *Kyne*, 358 U.S. 184	7
Local 542, etc. v. *National Labor Relations Board*, E.D. Pa., Civil Action 35,664	6
National Labor Relations Board v. *Auto Ventshade, Inc.*, 276 F. 2d 303	8
National Labor Relations Board v. *Electrical Workers*, 308 U.S. 413	7
National Labor Relations Board v. *Falk Corp.*, 308 U.S. 453	7
National Labor Relations Board v. *Trimfit of California*, 211 F. 2d 206	8
Ove Gustavsson Contracting Co. v. *Floete*, 278 F. 2d 912, certiorari denied, 364 U.S. 894	8
Pacemaker Corp. v. *National Labor Relations Board*, 260 F. 2d 880	8
Progressive Mine Workers v. *National Labor Relations Board*, 187 F. 2d 298	6
Surprenant Mfg. Co. v. *Alpert*, 318 F. 2d 333	8
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	6

Statutes: Page

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) .. 2
Section 8(b)(1)(A) 5, 6
Section 10(e) 7
Section 10(f) 7
Administrative Procedure Act (61 Stat. 237, 5 U.S.C. 1001, *et seq.*) 2

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 174

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 24a-30a) is reported at 328 F. 2d 850. The Board's decision and order (Pet. 7a-23a) are reported at 139 NLRB 1169.

JURISDICTION

The decision of the court of appeals (Pet. 24a-30a) was entered on March 13, 1964, and its decree (Pet.

31a-32a) was entered on April 15, 1964. The petition for a writ of certiorari was filed on June 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the union's conduct relating to a picket line during a strike at the Company tended to restrain and coerce the Company's employees in violation of Section 8(b)(1)(A) of the National Labor Relations Act.

2. Whether the court of appeals correctly decided that it lacked jurisdiction to compel the Board to hold a representation election.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Administrative Procedure Act (61 Stat. 237, 5 U.S.C. 1001, *et seq.*) are reprinted in the petition (Pet. 1a-6a).

STATEMENT

a. *The Board's Findings of Fact.*—On March 5, 1962, petitioner Union filed a petition for certification as the collective bargaining representative of the production and maintenance employees of Giles and Ransome, Inc., which is engaged in the sale and service of earth-moving equipment. A hearing was held on

the petition on March 27 and April 23, 1962, but, due to the unfair labor practices hereafter described, no election has as yet been scheduled (Pet. 12a).

At a meeting of the Company's employees held on March 13, the employees voted in favor of a strike, which began the next day and continued for approximately 10 weeks. The entrance to the Company's plant was picketed on a 24-hour, around-the-clock basis by the striking employees and by other union members. William Adley, the Union's treasurer, supervised the picket line daily (Pet. 12a-13a; J.A. 101a, 130a).[1]

On March 16, office boy Henry Olczak drove his car slowly up to the plant entrance and stopped at the picket line. Adley remarked to Olczak, a 19-year old boy, that he would never reach the age of 21 if he were "ever caught taking parts in and out of Giles and Ransome" (Pet. 13a-14a; J.A. 27a-28a).

On March 22, Adley asked Botnick, a nonstriking sales demonstrator for the Company, not to drive through the picket line. Adley told Botnick that he would be blacklisted by the Union if he went through the line and that he would be prevented from working on any union jobs. Botnick said that he had to go through. Police officers, who were present throughout the picketing, opened up the line for Botnick. As he drove past the pickets, Adley yelled at him, "You'll pay for this" (Pet. 15a; J.A. 32a-33a). About a week later, Botnick was again stopped at the picket line.

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[1] "J.A." refers to the Joint Appendix in the court below, which has been filed with the petition.

This time Adley told him: "Before this is all over your car is going to have to be painted black. * * * That car and you will be in black crepe paper." The police on duty opened up the picket line and Botnick went through (Pet. 15a; J.A. 34a).

Joseph Parker, who had been on strike, attempted to return to work on March 22, but was stopped at the picket line and asked by Adley and a striker why he was returning to work. After some discussion Parker agreed to stay on strike for one more day. As he turned his car around, he noticed a flat rear tire. Parker subsequently found that the side of the tire had been slashed (Pet. 15a-16a; J.A. 60a).

About 10 a.m. on March 27, as Police Officer William Edwards was letting a truck out of the Company's plant, he saw Adley place an object under the truck's left front tire. Edwards immediately stopped the truck and had it backed up. Adley then removed a piece of tile with several nails in it from the tire, saying to Edwards: "You got me now. You got me this time" (Pet. 17a-18a; J.A. 49a-50a).

That same day, at about 11:30 a.m., Sales Demonstrator Botnick and Salesman Theodore Stratton delivered a Company bulldozer to a job site in Philadelphia. Shortly after their arrival, Union Business Agent Armon Acchioni told Botnick, "Anyone that goes through a picket line deserves to get his head split open" (Pet. 16a; J.A. 36a). About noon Adley and some Company employees came to the job site. Adley told Botnick and Stratton that, if the Company did not become unionized, it "wouldn't be able to get any equipment on any union job," and that the two

men would "never be able to work on any union jobs." He declared, referring to the picket line, "They think they've seen violence—they don't know what violence is." He named several customers of the Company, and stated that Company equipment would be barred from their jobs and the Union would picket wherever Company equipment went (Pet. 16a-17a; J.A. 37a, 43a-44a).

b. *The Board's Conclusions and Order.*—The Board found (Pet. 7a-8a, 21a) that the Union violated Section 8(b)(1)(A) of the Act by threatening employees with physical harm, blacklisting, and other economic reprisals for crossing the Union's picket line; by damaging the automobile of an employee who sought to cross the picket line; and by damaging a truck that was leaving the employer's premises. The Board's order (Pet. 8a-9a) requires the Union to cease and desist from the unfair labor practices found and from any like or related conduct, and to post appropriate notices.

c. *The Court of Appeals' Decision.*—The Union requested the court of appeals to set the Board's unfair labor practice order aside, and to direct the Board to conduct a representation election on its petition. The court, finding substantial evidence to support the Board's unfair labor practice finding, enforced the Board's order. Concluding that it lacked jurisdiction to direct the Board to conduct an election, the court denied the Union's request for an election[2] (Pet. 24a-30a).

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[2] Subsequent to the court of appeals' decision, the Union filed suit in a federal district court, again seeking to compel

ARGUMENT

1. Petitioner's contention that the incidents of misconduct found to be violative of Section 8(b)(1)(A) were too trivial to be coercive (Pet. 11-13, 22-24) raises an issue concerning the substantiality of the evidence which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, the evidence fully supported the Board's findings.

As the court below noted (Pet. 26a), since "the incidents occurred in the early days of the strike and within the relatively short period of eleven days, when the Union was most active in its organizational effort," the Board was warranted in concluding that the conduct of the offenders—who were top officials of the Union—"created an atmosphere of coercion and intimidation." It is not material that there was no showing that anyone was in fact coerced or intimidated by the Union's action. As the court added (Pet. 26a-27a), the test is "not whether the misconduct proves effective," but "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Highway Truck Drivers & Helpers Local 107* v. *National Labor Relations Board*, 273 F. 2d 815 (C.A. D.C.); *Progressive Mine Workers* v. *National Labor Relations Board*, 187 F. 2d 298, 301 (C.A. 7).

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the Board to hold an election. *Local 542, etc.* v. *National Labor Relations Board*, E.D. Pa., Civil Action 35,664. The case has not yet been reached for hearing.

2. Petitioner's further contention (Pet. 8-11, 13-22, 24-25) that the court of appeals should have directed the Board to hold a representation election is without merit. Since the court of appeals had no jurisdiction over this issue, it correctly refused to consider the Union's contention.

It is well settled that the jurisdiction conferred on the court of appeals by Section 10(e) and (f) of the Act, which empower the courts of appeals to review a "final order of the Board," does not include jurisdiction to direct the Board to hold an election or issue a certification. *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401; *National Labor Relations Board* v. *Electrical Workers*, 308 U.S. 413. The Act provides for review in the court of appeals of Board action in a representation proceeding only where it has become the basis of a final order in an unfair labor practice case which is itself before the court for review or enforcement. The representation proceeding which petitioner sought to have reviewed did not form the basis of the unfair labor practice case before the court of appeals, and hence the foregoing exception is inapplicable here. Cf. *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453.

Leedom v. *Kyne*, 358 U.S. 184, did not extend the reviewing authority of the court of appeals over representation proceedings. That case involved a suit in the federal district court, whose jurisdiction is not as narrowly circumscribed as that of a court of appeals. Indeed, in *Boire* v. *Greyhound Corp.*, 376 U.S. 473, which also involved an effort to obtain review of a Board representation proceeding in the

district court, this Court, in emphasizing the limited reach of *Kyne*, indicated that it had nothing to do with the review of representation determinations in the court of appeals; the Court stated that it has "consistently refused to allow direct review of such orders in the Courts of Appeals * * *." *Id.* at 479. Nor does the Administrative Procedure Act empower the court of appeals to review a Board representation proceeding where the National Labor Relations Act, as construed by this Court, denies it. As the court below pointed out (Pet. 29a), the Administrative Procedure Act is "remedial and not jurisdictional." See *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912, 914 (C.A. 2), certiorari denied, 364 U.S. 894.[3]

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[3] Even if the court of appeals had jurisdiction to direct the Board to hold an election, it is clear that the Union's contention is without substance on the merits. The Board has discretion to refuse to proceed to an election where unfair labor practices have been committed which would tend to preclude a free choice by the employees. *Surprenant Mfg. Co.* v. *Alpert*, 318 F. 2d 396 (C.A. 1); *Pacemaker Corp.* v. *National Labor Relations Board*, 260 F. 2d 880, 882 (C.A. 7); *National Labor Relations Board* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 307 (C.A. 5); *National Labor Relations Board* v. *Trimfit of California*, 211 F. 2d 206, 209 (C.A. 9). It did not abuse its discretion in following that course here until the Union removes the coercive effect by complying with the Board's unfair labor practice order.

CONCLUSION

For the reasons stated above, we respectfully submit that the petition for a writ of certiorari should be denied.

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